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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M. F., a Person Coming Under the Juvenile Court Law.	B187723
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. PRECILLA O., Defendant and Respondent; ---------- M. F., Appellant.	(L.A.S.C. No. CK 46126)

APPEALS from an order of the Superior Court of Los Angeles County. David Doi, Judge. Affirmed.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel and Judith A. Luby, Deputy County Counsel, for Plaintiff and Appellant.

Aida Aslanian, under appointment by the Court of Appeal, for Appellant Minor.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Respondent.

The Los Angeles County Department of Children and Family Services (DCFS) and dependent ward M. F. (hereafter Appellants) appeal from a juvenile court order, made under Welfare and Institutions Code section 366.26,[1] selecting long-term foster care as the permanent plan for M. F. Appellants maintain that the court's finding of the section 366.26, subdivision (c)(1)(A) exception to the statutorily preferred long-term plan of adoption is not supported by substantial evidence. We find sufficient evidence and affirm.

FACTS

M. F. was born in December 2002. At the time, Precilla O. (mother) was in an outpatient drug rehabilitation program and had lost custody of her three other children after selling drugs from the family home.[2] On December 26, 2002, mother tested positive for marijuana use after missing meetings of her treatment program. A program counselor saw her breastfeed M. F. after testing positive and notified the Child Abuse Reporting Center. On January 6, 2003, DCFS detained M. F. Mother began a residential drug treatment program on January 7, 2003. There, she had daily random drug testing and weekly visits with M. F., with whom she appeared to be bonding well.

DCFS filed a petition under section 300 alleging that mother had a history of substance abuse, earlier convictions for selling drugs and for cruelty to children, and domestic violence problems that made her unsuitable to raise M. F.[3] At the section 300 detention hearing on January 9, 2003, the juvenile court ordered no reunification services for mother and father, but granted them monitored visits and ordered DCFS to attempt to place M. F. with appropriate relatives for foster care. Finding no suitable relatives, on February 6, 2003, DCFS placed M. F. in the same foster home as her three siblings.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.
[2] Rodney F. (father) filed no brief on appeal, so our factual and legal analysis will focus mostly on mother.
[3] The petition made similar allegations against father.

At a section 300 disposition hearing in early March 2003, DCFS requested no reunification services based on the parents' failure to reunify with their other children. But the agency noted that mother had shown remorse and expressed determination to learn new skills, stay sober, and regain custody of her children. At a later section 300 hearing in April, DCFS produced additional evidence that mother had failed five drug tests for marijuana in 2002 before the December 26 test, and had missed fifteen other tests that year. The parents submitted to, and the court sustained, the DCFS petition. On June 17, 2003, the court declared M. F. to be a dependent of the court, ordered six months of reunification services for the parents, and ordered them to attend drug rehabilitation and domestic violence counseling sessions. The court granted the parents monitored visits, with DCFS authorized to liberalize visitation terms.

In the meantime, in late April 2003, mother left her first residential treatment program, where she had problems with rule violations, and started a different one, where she made smoother progress toward the goals of her DCFS case plan. By December 2003, mother had undergone numerous random drug tests over several months with negative results. She progressed from weekly monitored visits with M. F. in early 2003 to full-day unmonitored visits starting on August 24, overnight visits starting on September 20, and three-day/two-night visits starting on October 22, 2003. Counselors at mother's residential treatment program reported that these visits were positive, with mother actively applying skills learned in parenting classes, and they recommended that mother be allowed to care for M. F. at the treatment program full time.

At a six-month review hearing on December 16, 2003, pursuant to section 366.21, subdivision (e), the court found both parents in compliance with the case plan and ordered DCFS to place M. F. in mother's custody, under DCFS supervision, and to provide mother with family maintenance services. Mother and M. F. resided at the residential treatment program from December 16, 2003 to January 25, 2004, when mother's treatment program ended. They then transferred to a sober living home. Mother had problems with the facility's rules and with her roommate, so she often slept at the home of the foster mother, while M. F. slept most nights there and also spent six

days a week there in day care. Mother worked the graveyard shift at a job and claimed to be often too tired to visit M. F. during the day. A DCFS worker warned mother that she must take more responsibility for her daughter and must spend nights at the sober living home. From December 2003 to May 2004, mother had 18 more clean drug tests. In December, 2003, mother told DCFS staff that she intended to live apart from father. On February 13, 2004, mother called police to report that father had attempted to choke her in a domestic violence incident. In May, during an unannounced visit, a DCFS case worker found father at mother's home. Through the first half of 2004, mother attended some life skills classes but also missed appointments for family maintenance services.

On June 15, 2004, the juvenile court held a review hearing pursuant to section 364. Noting that certain problems remained, the court extended M. F.'s placement in mother's home and family maintenance services, and ordered mother to attend an additional domestic violence class. The court also ended reunification services but maintained visitation rights for father.

The next day, June 16, mother was arrested after attempting to defraud a Best Buy store. M. F. was with mother at the time. Mother pled guilty to commercial burglary and was sentenced to a year in jail on June 22, but was released on June 29 due to jail overcrowding. While mother was incarcerated, M. F. was left in the care of her maternal grandfather, who released her to her former foster mother on June 26. Mother arranged for father to transport M. F. to the foster home, even though he was not allowed unmonitored visits with his daughter. That same day, the foster mother took M. F. to the hospital for treatment of a serious ear infection. On June 28, mother called her DCFS case worker and said that she and M. F. were visiting mother's sister in Arkansas. Later that day, the foster mother called the case worker to report that mother had been arrested and that M. F. was back at the foster home with her siblings. DCFS re-detained M. F. and placed her with the foster mother.

At later hearings pursuant to section 342, mother and father submitted to, and the court sustained, the DCFS detention petition based on the February 2004 domestic violence incident, mother's arrest, and the parents' failure to provide M. F. proper

medical care. The court granted mother two-hour monitored visits at least three times a week. At a contested section 342 disposition hearing on October 25, 2004, M. F.'s case worker testified regarding mother's recent problems, including missed drug tests and lying to DCFS about visiting Arkansas. Mother testified that she had missed some drug tests only because her work schedule and commute made those tests impossible, that she was continuing to take required classes and was living with her father.

On November 2, 2004, the court again declared M. F. to be a dependent of the court, ordered no further reunification services for mother and set a section 366.26 permanent placement hearing. On November 22, M. F.'s case worker initiated an adoption assessment for M. F., focusing on her foster mother. In a report for a status review hearing under section 364 on December 10, 2004, DCFS reported additional missed drug tests, but also that mother was staying employed, was regularly engaging in two-hour visits with her children, mostly on weekends, and was willing to take additional classes and continue drug testing to regain custody of M. F. DCFS also reported that the foster mother was committed to adopting M. F., and the agency recommended that permanent placement.

The section 366.26 hearing commenced on June 10, 2005. In its report, DCFS found M. F. to be thriving in the foster mother's care, along with her siblings. DCFS also reported that mother visited regularly on weekends, that these visits were positive and enjoyable for the children, and that mother and the foster mother had a good relationship. The agency also noted that mother had missed nine of thirteen drug tests since November 2004 and had not completed her second court-ordered domestic violence class. DCFS recommended termination of parents' parental rights and adoption of M. F. by her foster mother, who by then had adopted M. F.'s three siblings.

On July 7, 2005, the court heard testimony. The DCFS case worker acknowledged that mother's visits with her children were positive, but the case worker showed limited knowledge of the details of the visits—on which days, how long, whether mother fed, bathed, or otherwise cared for M. F. during visits, and such matters—beyond the brief description in the DCFS report. The next day, mother testified that during the first six

months of 2005, she had regularly visited on both weekend days from around noon until 8:00 or 8:30 p.m. when the children went to bed. The foster mother allowed mother to have extensive time alone with M. F., and to change her clothes and diapers, feed her, clean her, hold her while she slept, play with her, and walk to the store and back with her. Mother brought the children clothing and food. M. F. called mother "Mommy," was excited when mother arrived, and cried when she left. Mother had to promise M. F. that she'd come back the next day. Counsel for DCFS and M. F. asked mother no questions.

After several continuances, the court issued its ruling on permanent placement on October 5, 2005. The court found the section 366.26, subdivision (c)(1)(A) exception to apply in M. F.'s case due to "unusual and special circumstances[.]" The court noted that the foster mother had taken excellent care of mother's children while also encouraging the parents' visitation, and that mother was not only engaging in lengthy visits when she could, but was also taking care of M. F. and interacting with the other children. The court concluded that "there is a bonding between the mother and [M. F.] because of the fact that for a period of time the mother has been providing daily care in terms of not [merely] playing or visiting with the child but actually taking care of the child, whether it be feeding the child, clothing the child, bathing the child." The court noted that at one point, mother had been in compliance with her case plan, then everything fell apart. The court further lectured mother that it was concerned about the foster mother, who was "taking care of the kids primarily, and she's getting old, and I'm telling you she can't do this forever, [mother]. Somebody has got to be there, and if it is not you, it is going to be somebody that the kids don't know." The court expressed its hope that mother could "get back on track" and help the foster mother more. Based upon the finding of parental bonding, the court rejected DCFS's recommendation of adoption and selected long-term foster care as the most appropriate plan.

Appellants filed timely notices of appeal.

DISCUSSION

DCFS contends that the juvenile court's selection of long-term foster care and rejection of adoption are erroneous, unsupported by the evidence, and beyond the bounds of reason. M. F. similarly maintains that there is no substantial evidence to support the court's ruling. We disagree.

Section 366.26, subdivision (c)(1) provides that if a juvenile court finds clear and convincing evidence that a child is likely to be adopted, then the court shall terminate parental rights and order the child placed for adoption unless the court finds a compelling reason, from a list of five statutory exceptions, why termination would be detrimental to the child. (§ 366.26, subd. (c)(1); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) In this case, no party questions M. F.'s adoptability, so we need only consider whether the juvenile court was justified in finding that an exception applies.

Subdivision (c)(1)(A) of section 366.26 creates an exception to the normal presumed permanent placement plan—adoption—where "[t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." But the statute does not further define the sort of relationship that will trigger this exception. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534 (hereafter *Brandon C.*).) Courts have interpreted the exception to require a relationship that promotes the child's well-being to a degree that outweighs the benefits the child would gain from a permanent home with new adoptive parents, such that severing the natural parent/child relationship would deprive the child of such a substantial, positive emotional attachment that the child would be greatly harmed. (*Id*. at p. 1534.)

Since a child normally will derive some incidental benefit from interaction with a natural parent, courts require more than just frequent and loving contact to find the exception; a sufficient relationship must be of the sort that "'arises from day-to-day interaction, companionship and shared experiences . . . '" resulting from regular visits and contact. (*Brandon C.*, *supra*, 71 Cal.App.4th at p. 1534, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) However, a strong and beneficial parent-child

relationship sufficient for purposes of the exception can exist even without day-to-day contact and interaction. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51 (hereafter *Casey D.*) But the parent must occupy a parental role in the child's life and provide the sort of ongoing care and nurturing that parents normally provide. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) To be merely a "friendly visitor" is not sufficient. (*In re Angel B.*, *supra*, 97 Cal.App.4th at 468.)

The juvenile court enjoys considerable discretion in selecting permanent placement options and determining whether exceptions apply under section 366.26. Appellate courts generally apply the deferential substantial evidence standard in reviewing such determinations. (See, e.g., *Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1533-1534; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)[4] Under this standard, we must accept as true the evidence most favorable to the order and discard countervailing evidence, and we must not reweigh the evidence or substitute our judgment for that of the trial court. (*Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.)[5]

Giving proper deference to the trial court's findings, we find that substantial evidence supports the court's order. Mother's testimony at the section 366.26 hearing in July 2005 described a relationship which, although lacking daily contact during much of M. F.'s young life, showed a strong parental bond between M. F. and mother and involved the sort of care and nurturing that characterizes the parental role. Although Appellants emphasize the other evidence in the record which shows ongoing problems in mother's life or which may indicate a less substantial parent-child relationship, it is the

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[4] A minority of appellate courts have applied the similarly deferential abuse of discretion standard instead. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) For our purposes, "[t]he practical differences between the two standards of review are not significant" because both require that we show broad deference to the trial judge on factual findings. (*Id.* at p. 1351.)

[5] Under the abuse of discretion standard, a reviewing court must view all evidence most favorably in support of the trial court's order and reverse only if no judge reasonably could have made that order. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

trial court's duty to assess the credibility of witnesses and weigh the evidence, not ours. (*Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.)

Appellants cite numerous authorities in which appellate courts upheld juvenile court orders to terminate parental rights and place children for adoption after finding lack of a sufficiently strong bond between parents and children to support the subdivision (c)(1)(A) exception. (See, e.g., *In re Autumn H.*, *supra*, 27 Cal.App.4th 575; *In re Angel B.*, *supra*, 97 Cal.App.4th 454; *In re Cliffton B.*, *supra*, 81 Cal.App.4th 415; *In re Derek W.*, *supra*, 73 Cal.App.4th 823; *In re Brittany C.* (1999) 76 Cal.App.4th 847; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411.) But these authorities are of course procedurally different from this case. The cases cited by Appellants provide examples of situations where appellate courts deferred to trial courts' findings that the exception *does not* apply, but they do not necessarily illustrate how a reviewing court should defer to a juvenile court's finding that the (c)(1)(A) exception *does* apply.

Rather, we find guidance in *Brandon C.*, *supra*, 71 Cal.App.4th 1530, in which an appellate court affirmed a trial court's finding of sufficient evidence to support the subdivision (c)(1)(A) exception. In *Brandon C.*, the mother visited her twin sons regularly throughout the duration of the dependency case, like M. F.'s mother. (*Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1535-1537.) As in this case, in *Brandon C.*, DCFS offered limited evidence on the quality of the mother's visits, or how she interacted with her children, at the section 366.26 hearing. (*Id*. at p. 1536.) But M. F.'s mother, like the mother in *Brandon C.*, presented evidence that M. F. called her "mommy," greeted her excitedly when she visited, and cried when she left. (*Id*. at pp. 1535, 1536-1537.) Similarly, both mothers, in addition to playing with their children, helped feed them and changed their diapers during visits. (*Id*. at p. 1535.) Indeed, the mother in *Brandon C.* had less contact with her children than M. F.'s mother had due to a court order limiting her visits to two hours once a week. (*Id*. at p. 1536.)

Yet despite the mother's limited contact, the juvenile court in *Brandon C.* found that the subdivision (c)(1)(A) exception applied. (*Brandon C.*, *supra*, 71 Cal.App.4th at p. 1533.) The appellate court affirmed, noting that the trial court credited testimony on

visits showing a close bond and had discretion to discount DCFS's evidence on visits. (*Id*. at p. 1537.) The trial court in this case enjoyed the same discretion, and we defer to it.

Appellants insist that for the subdivision (c)(1)(A) exception to apply, a parent must occupy a parental role, and they point out that the foster mother, not mother, was the primary caregiver throughout nearly all of M. F.'s life. These points are correct, but the statute does not require a parent to be a primary caregiver, and the trial court found sufficient evidence of a parental role. As we have seen, day-to-day contact, though desirable, is not necessary to support the exception. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) In *Brandon C.*, the mother was not the children's primary caretaker, so a "quantitative measurement of the specific amount of 'comfort, nourishment or physical care' she provided" during visits was unnecessary; the benefit of her visits had to be considered in the context of her limited access to her children. (*Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1537-1538.) Although the court in *Casey D.* reasoned that the exception would be difficult to prove in a situation where a parent never had custody or unmonitored visits (*Casey D.*, *supra*, at p. 51), we note that in this case, mother had both at one time or another.

Appellants contend that mother did not separately show, and the court did not separately find, that termination of mother's parental rights would greatly harm M. F., or that this harm would outweigh the benefit from adoption. These arguments are in effect different iterations of the same substantial evidence argument we have already addressed, and we reject them for the reasons discussed above.

Appellants also contend that it was inappropriate for the trial court to mention or consider the foster mother's age, or the possibility of mother taking a more active role in caring for her children, in a section 366.26 hearing. We refer again to *Brandon C.*, where the appellate court was untroubled by the trial court's reference to the mother in that case "being able to provide a 'safety valve in the future, if need be'" to help backstop an aging foster mother in caring for the children. (*Brandon C.*, *supra*, 71 Cal.App.4th at p. 1538.) The reviewing court found the trial court's attention was focused primarily on the parent-

child relationship and resulting benefits, noting, "The fact that the court also felt a good relationship between mother and children could provide additional security for the children, 'if need be,' does not undermine the evidentiary support for the court's finding under section 366.26, subdivision (c)(1)(A)." The same reasoning applies in this case.

Appellants emphasize that adoption is the Legislature's preferred permanent placement plan, and that a child under the authority of the juvenile court is entitled to the benefits that adoption should bring, such as permanency, security, stability, and the opportunity to bond more fully with adoptive siblings and parents. These points are well taken. But the presumption in favor of adoption only applies where there is no finding of an exception pursuant to section 366.26, subdivision (c)(1). Here, of course, there was such a finding.

Appellants also point out that adoption here would pose little risk to the natural parent-child relationship because the foster mother has actively encouraged parental visits and likely would continue to do so. But in this situation, where all parties acknowledge that the foster mother who has adopted M. F.'s three siblings is an excellent caregiver who treats M. F. as her own child, it is at least as likely that M. F., in long-term foster care, effectively will enjoy the benefits of adoptive placement while also being assured of maintaining a significant relationship with her natural mother.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

VOGEL, J.